

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
HELENA DIVISION**

BENJAMIN C. SMITH,

Plaintiff,

vs.

LOWE’S STORE, INC., a North  
Carolina Corporation; and TOM  
SMITH, in his official capacity,

Defendants.

No. CV-21-42-H-SEH

**ORDER**

On June 1, 2021, Plaintiff Benjamin C. Smith (“Plaintiff”) moved to proceed in forma pauperis<sup>1</sup> without prepaying fees or costs.

The application will be GRANTED subject to the terms and conditions of this Order.

The Complaint has been screened under 28 U.S.C. §§ 1915(e)(2) and 1915A(a) and 42 U.S.C. § 1997e(c), and has been read liberally.<sup>2</sup> Reasonable inferences have been made.<sup>3</sup>

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<sup>1</sup> See Doc. 1.

<sup>2</sup> See *Sause v. Bauer*, 138 S. Ct. 2561, 2563 (2018).

<sup>3</sup> See *McCabe v. Arave*, 827 F.2d 634, 640 n. 6 (9th Cir. 1987) (citing *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983).

The Court will not treat Plaintiff more favorably than parties with counsel of record,<sup>4</sup> is not obliged to assume or fill the role of Plaintiff's counsel, and may not provide personal assistance to Plaintiff.<sup>5</sup>

Plaintiff claims subject matter jurisdiction under 28 U.S.C. § 1332.

However, diversity jurisdiction has not been properly pleaded.<sup>6</sup>

Diversity of citizenship jurisdiction, if it exists, must be grounded in 28 U.S.C. § 1332, which provides, in pertinent part:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between—

(1) Citizens of different States;<sup>7</sup>

Federal jurisdiction cannot be presumed. The diversity statute requires complete diversity of citizenship between all plaintiffs and all defendants.<sup>8</sup> It is to

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<sup>4</sup> See *Jacobsen v. Filler*, 790 F.2d 1362, 1364 (9th Cir. 1986).

<sup>5</sup> *Pliler v. Ford*, 542 U.S. 225, 231 (2004) (quoting *Martinez v. Ct. of Appeal of Cal., Fourth App. Dist.*, 528 U.S. 152, 162 (2000)).

<sup>6</sup> See Doc. 2 at 6.

<sup>7</sup> 28 U.S.C. § 1332 (a)(1).

<sup>8</sup> See 15 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 102.12, at 102-28 (3d ed. 2015).

be strictly construed.<sup>9</sup> Plaintiff, as the party asserting jurisdiction, has the burden of proving such jurisdiction exists.<sup>10</sup>

Plaintiff fails to allege his own citizenship or the citizenship of Defendant Tom Smith.<sup>11</sup> The diversity jurisdiction statute speaks of citizenship, not of residency.<sup>12</sup> An allegation of residency is insufficient to invoke diversity jurisdiction.<sup>13</sup>

Fed. R. Civ. P. 12(h)(3) contemplates that lack of jurisdiction can be raised at any time. Moreover, jurisdiction may be raised by a party, or by the courts own initiative, at any stage in the litigation, even after trial and judgment entry.<sup>14</sup>

Plaintiff's complaint, likewise, does not properly plead a claim upon which relief can be granted as to Claims Two and Three.

An amended complaint may be filed. It is expected to state: (1) proper grounds for diversity jurisdiction; (2) the facts asserted to have been engaged in by each Defendant that will enable the Court to draw reasonable inference that each

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<sup>9</sup> See *City of Indianapolis v. Chase Nat. Bank of City of New York*, 314 U.S. 63 (1941).

<sup>10</sup> See *Lew v. Moss*, 797 F.2d 747 (9th Cir. 1986).

<sup>11</sup> See Doc. 2 at 6.

<sup>12</sup> See *Kanter v. Warner-Lambert*, 265 F.3d 853, 857 (9th Cir. 2001).

<sup>13</sup> *Id.*

<sup>14</sup> See *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006).

Defendant is liable for the conduct that each Defendant is asserted to have engaged in; (3) that such conduct damaged Plaintiff's legally protected interests or property rights; and (4) that such conduct gives rise to the claim or claims Plaintiff asserts against each Defendant.<sup>15</sup>

ORDERED:

1. Plaintiff's Application to Proceed in District Court without Prepaying Fees or Costs is GRANTED.<sup>16</sup>

2. Plaintiff shall have to and including **June 18, 2021** in which to file an amended complaint that meets and satisfies pleadings requirements necessary and appropriate to state a case within the jurisdiction of this Court.

3. If an appropriate amended complaint is not timely filed, this case will be dismissed.

DATED this 4<sup>th</sup> day of June, 2021.

A handwritten signature in black ink, reading "Sam E. Haddon", written over a horizontal line.

SAM E. HADDON  
United States District Judge

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<sup>15</sup> See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007).

<sup>16</sup> See Doc. 1.